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In the Supreme Court of the United States

October Term, 1949

CHAN WING CHEUNG, ALSO KNOWN AS BILL WOO,
PETITIONER,

v.

FRANK C. HASSETT, OFFICER IN CHARGE, UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, PROVIDENCE, RHODE ISLAND

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 648

CHAN WING CHEUNG, ALSO KNOWN AS, BILL WOO, PETITIONER,

v.

FRANK C. HAGERTY, OFFICER IN CHARGE, UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, PROVIDENCE, RHODE ISLAND

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (R. 19-21) is reported at 271 F. 2d 903. The opinion of the District Court for the District of Rhode Island (R. 6-18) is reported at 176 F. Supp. 421.

JURISDICTION

The judgment of the court of appeals was entered on November 19, 1959 (R. 21). The petition for a writ of certiorari was filed on January 18, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an alien "who has remained longer in the United States than the period for which he was admitted", and who has not been in the country for the ten years required for the suspension of deportation of such an alien under paragraph (5) of Section 244(a) of the Immigration and Nationality Act, is entitled to apply for suspension under paragraph (3), which specifically is made inapplicable to persons "within the provisions of paragraph (4) or (5)".

2. Whether the enactment in 1952 of more stringent conditions for suspension of deportation of aliens constituted *ex post facto* legislation within the prohibition of the Constitution.

STATUTE INVOLVED

The Immigration and Nationality Act of 1952, Section 244(a) (8 U.S.C. 1254(a)), provides in pertinent part:

> As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who—
>
> * * * * *
>
> (2) last entered the United States within two years prior to or at any time after June 27, 1952; is deportable under any law of the United States solely for an act committed or status existing prior to or at the time of such entry into the United States and is not within the provisions of para-

graph (4) of this subsection; was possessed of all of the requisite documents at the time of such entry into the United States, has been physically present in the United States for a continuous period of not less than five years immediately preceding his application under this paragraph, and proves that during all of such period he has been and is a person of good moral character; has not been served with a final order of deportation issued pursuant to this chapter in deportation proceedings up to the time of applying to the Attorney General for suspension of deportation; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen or an alien lawfully admitted for permanent residence; or

(3) last entered the United States within two years prior to, or at any time after June 27, 1952; is deportable under any law of the United States for an act committed or status acquired subsequent to such entry into the United States and is not within the provisions of paragraph (4) or (5) of this subsection; was possessed of all of the requisite documents at the time of such entry into the United States; has been physically present in the United States for a continuous period of not less than five years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been

and is a person of good moral character; has not been served with a final order of deportation issued pursuant to this chapter in deportation proceedings up to the time of applying to the Attorney General for suspension of deportation; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen or an alien lawfully admitted for permanent residence; or

(4) last entered the United States within two years prior to, or at any time after June 27, 1952; is deportable under paragraph (1) of section 1251 (a) of this title insofar as it relates to criminals, prostitutes or other immoral persons, subversives, violators of narcotic laws and similar classes or under paragraph (2) of section 1251 (a) of this title, as a person who entered the United States without inspection or at a time or place other than as designated by the Attorney General, or without the proper documents and is not within the provisions of paragraph (5) of this subsection; has been physically present in the United States for a continuous period of not less than ten years after such entry and immediately preceding his application under this paragraph and proves that during all of such period he has been and is a person of good moral character; has not been served with a final order of deportation issued pursuant to this chapter in deportation proceedings up to the time of applying to the Attorney General for suspension of deportation; and is a person whose deportation would, in the opinion of the Attorney

General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen or an alien lawfully admitted for permanent residence; or

(5) is deportable under paragraphs (4)—(7), (11), (12), (14)—(17), or (18) of section 1251 (a) of this title for an act committed or status acquired subsequent to such entry into the United States or having last entered the United States within two years prior to, or at any time after June 27, 1952, is deportable under paragraph (2) of section 1251 (a) of this title as a person who has remained longer in the United States than the period for which he was admitted; has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period has been and is a person of good moral character; has not been served with a final order of deportation issued pursuant to this chapter in deportation proceedings up to the time of applying to the Attorney General for suspension of deportation; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen or an alien lawfully admitted for permanent residence.

STATEMENT

Petitioner seeks review of the judgment of the Court of Appeals for the First Circuit affirming the judg-

ment of the District Court for the District of Rhode Island dismissing petitioner's action for review of an order of the Board of Immigration Appeals. The Board had dismissed petitioner's appeal from an order denying his motion to reopen the deportation proceedings for the purpose of an application for suspension of deportation (R. 3, 6).

Petitioner, a native and citizen of China, entered the United States on August 10, 1950, as a temporary visitor until October 9, 1950 (R. 7-8). On April 6, 1956, after a hearing, the Special Inquiry Officer found that petitioner was deportable as one who had remained in the United States beyond the period for which he was admitted (R. 9). Petitioner requested and was granted permission for voluntary departure but failed to depart on the date specified, June 18, 1956 (R. 9-10). On June 28, 1957, petitioner filed a complaint in the District Court for the District of Rhode Island seeking a declaratory judgment that he was eligible for suspension of deportation under Section 244(a)(3), *supra*, pp. 3-4 (R. 11). The district court dismissed the complaint and, subsequently, the Court of Appeals for the First Circuit affirmed "without prejudice to pursuit by the [petitioner] of any further administrative remedy which may be available" (R. 11).

Petitioner then filed an application to reopen the deportation hearing so that he might apply for suspension of deportation under paragraph (2) of Section 244(a), *supra*, pp. 2-3, claiming that his passport had "probably" been "fraudulent" (R. 13). He made no claim under paragraph (3) (R. 11-13). The petition

to reopen was denied on the ground that petitioner was ineligible for suspension of deportation under paragraph (2) or any other paragraph of Section 244(a). the Board of Immigration Appeals, in affirming, pointed out that paragraph (2) is inapplicable to aliens overstaying their permitted time (R. 4).

Petitioner thereupon commenced the instant action in the district court, challenging the holding by the Board of Immigration Appeals, but, in addition, claiming eligibility for suspension of deportation under paragraph (3) (R. 12). The district court, upon extensive analysis of the language and legislative history of Section 244(a), held that petitioner was not within the provisions of paragraphs (2) or (3) (R. 13-17). The court of appeals affirmed *per curiam* (R. 19-21).

ARGUMENT

I. Section 244(a) makes clear that overstayed aliens, along with aliens who have committed the other deportation offenses specifically designated in paragraphs (4) and (5), *supra*, pp. 4-5, must have been physically present in the United States for at least ten years to be eligible for suspension of deportation, and cannot avail themselves of the lesser, five-year requirement of paragraph (3). Congress provided in paragraph (5) that an alien "who has remained longer in the United States than the period for which he was admitted" must have been physically present for not less than ten years thereafter to be eligible for suspension of deportation. Congress, with equal specificity, provided, in paragraph (3), that a five-year period of presence shall be sufficient only in case of an

alien who "is not within the provisions of paragraph (4) or (5)."

The legislative history confirms the intent of Congress to require that overstayed aliens be present in the United States at least ten years to be eligible for suspension of deportation. The Immigration and Nationality Act of 1952 originated in the House as H.R. 5678, introduced by Representative Walter. That bill, like the Act as finally passed, included overstayed aliens in paragraph (5), which required ten years' physical presence in the United States, in contrast to paragraph (3), which required only five years' presence (Pet. App. A, 3-5). The House Judiciary Committee, however, amended H.R. 5678, by, *inter alia*, transferring the provision as to overstayed aliens from paragraph (5) to (3) so that only five years' presence would have been required (Pet. App. A, 4-5). See H. Rep. No. 1365, 82d Cong., 2d Sess., pp. 61-62. As so amended, the bill was reported by the Judiciary Committee on February 14, 1952, and was passed by the House on April 25, 1952. 98 Cong. Rec 4444. The Senate Judiciary Committee, meanwhile, on January 29, 1952, reported S. 2550, which was substantially similar to the original H.R. 5678 insofar as it included overstayed aliens in paragraph (5) (Pet. App. A, 5-6). The Committee report clearly stated (S. Rep. No. 1137, 82d Cong., 2d Sess., pp. 24-25):

> The third category (sec. 244 (a) (3)) provides for the adjustment of status of a deportable alien, *except one* who is of a criminal, subversive, im-

moral, or narcotic class or *who overstays his period of admission* * * * [emphasis added].

* * * * *

The fifth category (sec. 244 (a)(5)) provides for the adjustment of status of a deportable alien of a criminal, subversive, immoral, or narcotic class *or* who *overstays his period of admission* * * * [emphasis added].[1]

These same provisions, along with the remainder of S. 2550, were inserted in H.R. 5678, and passed the Senate on May 22, 1952.[2] 98 Cong. Rec. 5803.

The differences between the House and Senate bills were reconciled in conference. The bill which was reported (and later passed, and repassed, over the President's veto, by both Houses) accepted the Senate ver-

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[1] This language answers any possible contention that petitioner was not within paragraph (5) because he had not been present in the United States for ten years. It is clear that Congress intended to make paragraph (3) inapplicable to all classes of aliens deportable for the reasons stated in paragraph (5). Petitioner was within paragraph (5), but failed to satisfy one of the several specifications there imposed in order to qualify for suspension.

[2] Petitioner speculates (Pet. 10, 13) that the failure of the Senate to accept an amendment proposed by Senator Lehman and others—which provided for only three subsections instead of five and which grouped overstayed aliens in a subsection including immoral persons (Pet. App. A, 6-7)—showed the Senate's desire to make a distinction between criminals and moral persons. While we think it is impossible to determine which of the various, complex provisions of the amendment led to its rejection, it seems clear that the reason was not because the Senate intended to make the distinction which petitioner suggests. Like the Lehman amendment, both S. 2550, which was preferred to the amendment, and the Act as it finally became law grouped overstayed aliens and immoral persons together in the same subsection.

sion with respect to the issue involved here.[3] Thus, Congress specifically rejected the House provision placing overstayed aliens in paragraph (3) and, instead, deliberately accepted the Senate provision including such deportable aliens in paragraph (5) which requires ten years' presence to be eligible for suspension. Clearly, then, the language of Section 244, as well as its legislative history, conclusively establishes that overstayed aliens are eligible for suspension if, and only if, they meet the requirements of paragraph (5).

2. Petitioner argues (Pet. 15-16) that the enactment of legislation in 1952 increasing to ten years the period of physical presence required for eligibility for suspension of deportation violated the *ex post facto* clause of the Constitution. The long-established and repeatedly reiterated view of this Court, however, has been that "the ex post facto clause does not apply to deportation." *Marcello* v. *Bonds*, 349 U.S. 302, 314; see *Johannessen* v. *United States*, 225 U.S. 227, 242; *Bugajewitz* v. *Adams*, 228 U.S. 585, 591; *Ng Fung Ho* v. *White*, 259 U.S. 276, 280; *Mahler* v. *Eby*, 264 U.S. 32, 39; *United States ex rel. Eichenlaub* v *Shaughnessy*, 338 U.S. 521, 529; *Harisiades* v. *Shaughnessy*, 342 U.S.

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[3] Petitioner claims (Pet. 10, 13-14) that the Act as passed was "substantially different" from S. 2550. He specifically asserts that by eliminating the word "or" from paragraph (5) of S. 2550, which had included overstayed aliens with immoral persons, the Act made a distinction between the two classes. It is difficult to understand how the elimination of the word "or" could make such a substantial difference as long as the Act retained overstayed aliens within paragraph (5). But, in any event, the Act did retain the word "or" to the same effect as in S. 2550. Cf. S. 2550 (Pet. App. A, 6, paragraph 5, line 6), with Section 244 of the Act (*supra*, p. 5, paragraph 5, line 5).

580, 594-595; *Galvan* v. *Press*, 347 U.S. 522, 531; *Lehmann* v. *United States ex rel. Carson*, 353 U.S. 685, 690. *A fortiori*, then, it does not apply to the conditions for the future exercise of suspension of deportation, which is a matter of grace.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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